92-10

No.

Supreme Court, U.S.
FILED
JUN 29 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARLOS TREVINO
and ISIDRO TREVINO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

FOR REVIEW

1. Can restitution be ordered in a property loss or damage case under the Victim and Witness Protection Act, 18 U.S.C. 3663, for a victim's income loss?

2. Can restitution be ordered in any case under the Victim and Witness Protection Act or the Federal Probation Act, 18 U.S.C. 3651, for substantial sums that are neither set out nor referred to in any charging document or plea agreement where a plea of guilty is entered?

PARTIES BELOW

There are no parties to the proceeding in the court below other than petitioners and respondent as shown in the caption to the instant petition.

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CARLOS TREVINO, and

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PETITION FOR WRIT OF CERTIORARI
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OPINION BELOW

An unpublished written opinion was filed by the United States Court of Appeals for the Ninth Circuit in the instant matter. This opinion is attached as Appendix "A" to this

petition.

An order denying a petition for rehearing presented by petitioners was also filed. This order is attached as Appendix "B" to this petition.

JURISDICTIONAL STATEMENT

1. The judgment below was filed February 28, 1992.

2. A petition for rehearing was filed March 11, 1992.

3. An order denying said petition was filed April 8, 1992.

4. The jurisdiction of the United States Supreme Court to review the proceeding below is conferred by Title 28, United States Code, Section 1254(1).

5. The time limits of Rule 13, United States Supreme Court Rules, have been met.

STATUTORY PROVISIONS INVOLVED

1. Title 18, United States Code, Section 3663. (Text set out as Appendix "C" to this petition.)

2. Title 18, United States Code, Section 3651, repealed effective November 1, 1987. (Text set out as Appendix "D" to this petition.)

STATEMENT OF THE CASE

A

Procedural Record

An information was filed January 31, 1990 in the United States District Court for the Central District of California charging petitioners jointly with two counts of violating 18 U.S.C. 2320 and 18 U.S.C. 2(a) and (b). The offense in count one was alleged to have occurred February 12, 1985; the offense in count two March 18, 1988.

(Excerpt of Record filed by petitioners below, pp. 1-2, hereafter designated "PER.")

On February 14, 1990, pursuant to plea agreement, petitioners waived prosecution by indictment and pleaded guilty to both counts of the information. (PER, pp. 3-5.) The plea agreement was filed the same date as the court's exhibit No. 1. (PER, pp. 6-7.)

Judgment was pronounced April 30, 1990. Petitioners were granted probation on condition, inter alia, that each pay restitution of $659,401.50 to the victim of count one, Palo Verde Nuclear Generating Station. (PER, pp. 8-11.)

Petitioners thereafter moved to set aside the restitution condition of their probation under former Rule 35(a)

of the Federal Rules of Criminal Procedure on the ground it constituted an illegal sentence. The motion was denied November 14, 1990. (PER, pp. 12-15.)

Petitioners appealed the above order November 21, 1990. (PER, pp. 16-17.) The appeal was denied February 28, 1992 (App. "A" attached); a petition for rehearing was denied April 8, 1992 (App. "B" attached).

This petition follows. Petitioners remain on probationary status pursuant to the judgment imposed April 30, 1990 and are not in violation of its terms or conditions.

B

Factual Summary

Petitioners owned two businesses, California Breakers, Inc. and ATS Circuit Breakers, which involved the

buying and reselling of electrical equipment. As part of their business operations, petitioners would recondition some of the equipment, affix copies of the original manufacturer's and underwriter's labels, and sell the equipment without informing the buyer of the reconditioning or obtaining the manufacturer's and underwriter's approval of the practice. On February 12, 1985 petitioners sold such equipment to Palo Verde Nuclear Generating Station and on March 18, 1988 sold such equipment to Electric Supply Company. (PER, pp. 28-34.)

The equipment sold to Electric Supply Company was never utilized. It was returned to petitioners and its purchase cost refunded. The equipment sold to Palo Verde was installed and

used in the company's operations for 4-1/2 years. In October, 1989 the operations were shut down to remove the equipment because its reconditioned character had been discovered. An expenditure of $84,973.00 was incurred in this connection by Palo Verde for testing and replacing the equipment. In addition, a further sum of $1,233.803.00 was claimed as a loss. (PER, pp. 23-25.)

This additional amount of 1.2 million dollars was referred to and characterized by the trial court and government three times at sentencing as "lost revenues" of Palo Verde because of the operational shut down. (Sentencing Transcript, p. 6, ls. 15-20, p. 13, ls. 7-11, p. 17, ls. 21-23, attached as Appendix "E" to this petition.) The sum was never mentioned

or alluded to in the plea agreement in the case (attached as Appendix "F") or in the government's proffer of proof at the time of entry of plea by petitioners (attached as Appendix "G"). Its first reference was in the presentence reports in the case, and the trial court included it in the order of restitution imposed on petitioners in the judgment.

C

Trial Court Jurisdiction

The basis of federal jurisdiction in the trial court in this case was a criminal information brought in the District Court under 18 U.S.C. 2320 and 18 U.S.C. 2(a) and 2(b).

ARGUMENT

A

Reason For Hearing

This case involves the recurrent

issue of the extent of a court's statutory authority to order restitution to a victim in a criminal case. Review is being sought and a hearing should be granted first to clarify and provide definitive resolution to the subject, second because the decision of the Court of Appeals below conflicts with this Court's decision in Hughey v. United States, __ U.S. __, 110 S.Ct. 1979 (1990), and third because the Court of Appeals' decision conflicts with other decisions of the United States Court of Appeals on related matters as discussed below.

B

Issue

At issue in this proceeding is the restitution amount of $1,233,803.00 imposed as part of the total order of

restitution of $1,320,000.00 in favor of Palo Verde Nuclear Generating Station on count one of the information. The balance of $84,973.00 is accepted as costs and expenditures actually paid out by Palo Verde to test and replace the equipment sold by petitioners four years earlier and used without incident following that time. The contested amount, however, as observed previously in the Case Statement, was characterized at sentencing as a revenue loss incurred by Palo Verde. (App. "E.")

C

Contentions

It is contended that revenue loss in a case such as the instant one not relating to bodily injuries but to property damage or loss cannot properly be ordered as restitution under Hughey

v. United States, supra, where restitution is sought to be imposed under the Victim and Witness Protection Act. It is further contended that under that act or the Federal Probation Act it is improper to impose substantial restitution on a guilty plea where neither the accusatory pleading nor the plea agreement mention or allude to the possibility of such restitution amount.

D

Applicable Statutes

The record in this case does not reflect whether the subject restitution order was made under the Victim and Witness Protection Act, 18 U.S.C. 3663, 3664 (formerly sections 3579, 3580), or the Federal Probation Act, 18 U.S.C. 3651, which, although repealed effective December 1, 1987, remained

applicable to offenses occurring before that date. The offense in count one relating to Palo Verde Nuclear Generating Station occurred February 12, 1985; accordingly both acts were applicable to it. United States v. Barany, 884 F.2d 1255, 1259 (9th Cir. 1989). Under either, however, the contested restitution amount cannot be sustained.

E

Victim and Witness Protection Act

This law was recently interpreted by this Court in Hughey v. United States, supra. The Court's interpretation imposed substantive limits on the application of the Victim and Witness Protection Act with respect to restitution awards in criminal cases. Hughey dealt specifically with

an issue not involved in the instant case, whether restitution could be ordered under the Victim and Witness Protection Act for other than the offense of conviction. However, the Court's reasoning in holding the law precluded such orders of restitution is directly applicable to the present matter and serves to invalidate the restitution award under consideration here.

This Court unanimously determined in Hughey that section 3579 (now 3663) of the Victim and Witness Protection Act provided "detailed substantive guidance regarding the calculation of restitution [within the parameters and context of] subsections (b)(1), (b)(2), and (b)(3) [of section 3579] [making] clear that [the section] does more than simply designate who is entitled to

restitution under the Act [but that] those provisions establish the amount of restitution that courts can award for various losses caused by the offense." 110 S. Ct. at p. 1983. [Emphasis by the Court.] This conclusion was a direct refutation of the government's contention that section 3579 only determined who could receive restitution but not the calculation of how much could be ordered.

Under Hughey's rationale, therefore, in calculating restitution under the Victim and Witness Protection Act, focus must be directed to the subsections specified since they provide the substantive scope of authorized restitution. In this regard it is at once clear that each of the three subsections deals with a specific

character of offense. Thus subsection (b)(1) concerns property loss, damage, or destruction cases, (b)(2) bodily injury cases, and (b)(3) death cases. Further, and of particular significance to the issue at bar, each subsection provides for a different calculus of restitution for the varied categories of offenses.

Critical in this regard is the distinction between property and bodily injury cases with respect to reimbursement for income loss. In bodily injury cases specific provision is made for such restitution in subparagraph (c) of subsection (b)(2); no comparable provision is to be found for income loss restitution in property loss cases. This substantive distinction in the law for determining the amount of authorized restitution in

the two categories of cases cannot be disregarded under Hughey. The limitation on (b)(1) restitution in property cases must be given effect. Accordingly, restitution for income loss, by the clear wording of the statutory provisions of the Victim and Witness Protection Act, has to be restricted to (b)(2) cases.

The offenses in the instant case are (b)(1) category crimes. The trial court, however, as reflected in Appendix "E," ordered restitution for a revenue loss of 1.2 million dollars. This was beyond the express substantive authorization of the law. The court was not empowered to order this restitution and the award should not be allowed to stand.

Indeed, in implicit recognition of the foregoing, the government argued on

appeal and the Court of Appeals agreed that the 1.2 million dollars in issue was not a loss of revenue but a cost of providing replacement power to consumers (App. "A," p. 4), and thus it was recoverable as restitution. This is not only a mischaracterization of the record (App. "E"), it misconstrues what Palo Verde did with the replacement power, which was to sell it to its customers and receive payment, i.e., income, in return. It then remitted this revenue to its power supplier rather than retaining it as income. Thus Palo Verde incurred no out-of-pocket loss in this matter but rather an income loss, and such loss is not recoverable as restitution under subsection (b)(1) of the Victim and Witness Protection Act.

A hearing by this Court is

accordingly required first to remedy the foregoing situation consonant with the Hughey decision and second to provide clear guidelines to trial courts for future case application in what is not an uncommon category of offense.

F

Federal Probation Act

Nor can the disputed restitution order be upheld under this law. Numerous Court of Appeals' decisions have held that under the Federal Probation Act the order of restitution is limited to the amounts set out in the count(s) of conviction or expressly provided for in a plea agreement. See, e.g., United States v. Whitney, 785 F.2d 824 (9th Cir. 1986), and cases cited therein; Karrell v. United States, 181 F.2d 981 (9th Cir. 1950);

United States v. Orr, 691 F.2d 431 (9th Cir. 1982); United States v. Gering, 716 F.2d 615 (9th Cir. 1983); United States v. Black, 767 F.2d 1334 (9th Cir. 1985).

The language of Whitney, as amended in 838 F.2d 404 (9th Cir. 1988), is particularly apropos in the context of the instant case where neither the information (attached as Appendix "H") nor the plea agreement (attached as Appendix "F") specify or refer to any loss subject of restitution. Thus Whitney states:

> "We have previously suggested that other methods of fixing restitution amounts might hypothetically prove as reliable and fair as use of plea agreements or indictment amounts. See Black, 767 F.2d at 1343 (citing Gering, 716 F.2d at 625) (court might fix restitution in an amount greater than amounts

> alleged in the indictment if the greater amount is 'judicially established'). However, in the plea bargain context, where the defendant forgoes the right to trial as the condition of his plea, he must know to what he pleads. "In this case Whitney and the government did not enter into a plea agreement concerning restitution. The indictment counts to which Whitney pleaded guilty did not state actual dollar losses sustained by the victims of his fraud. Therefore, the trial court erred in imposing restitution as a probation condition. "The district court's order denying Whitney's motion to correct an illegal sentence is reversed." [Emphasis added.] 838 F.2d at pp. 404-405.

The Court of Appeals in the instant matter chose not to discuss the foregoing holding and its manifest application to the issue under consideration here. (App. "A," p. 4.) But in avoiding the subject, a point of substantial importance was disregarded.

This concerns the fact that with the repeal of the Federal Probation Act effective November 1, 1987, all restitution orders for cases arising thereafter will be made under the Victim and Witness Protection Act; and the question thus becomes whether the decisions rendered under the former regarding restitution should not also be applicable to restitution under the latter. Certainly there appears little difference between the two acts in this respect; and the quoted language of Whitney finds equal application to both. Accordingly, review should be granted herein to resolve this undecided point of law which is certain to be recurrent on a broad scope in future cases.

G

Substantial Restitution Awards

A final point merits review in this case. Apart from the Whitney analysis, but related to it, are the authorities which hold that where restitution of a substantial amount is in issue, it is particularly necessary that it be included in or its possibility at a minimum be referred to in a plea agreement. These authorities include United States v. Runck, 601 F.2d 968 (8th Cir. 1979); United States v. Garcia, 698 F.2d 31 (1st Cir. 1983); United States v. Burruezo, 704 F.2d 33 (2d Cir. 1983); and United States v. Kamer, 781 F.2d 1380 (9th Cir. 1980). As Kamer observes, "'if restitution of less than $90,000.00 [in Runck] is material enough to demand express

inclusion in a plea agreement, it follows ineluctably that restitution of some [one million-plus] must likewise be included.'" 781 F.2d at p. 1389.

Such is the very situation at bar. Kamer, of course, and the other cited cases, were decided under the Federal Probation Act. Once again, therefore, the issue is presented of whether the rationale of such decisions logically compels their application to restitution orders under the Victim and Witness Protection Act. It is submitted the logic is compelling in this regard and that the instant case provides this Court with a unique and timely opportunity to render a decision of far reaching and just impact for lower courts nation wide to adhere to and follow.

H

Conclusion

For all of the reasons presented, review should be granted in this case and a writ of certiorari issued accordingly.

Respectfully submitted,

HOWARD E. BECKLER

Attorney for Petitioners

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISIDRO TREVINO,

Defendant-Appellant.

No. 90-50679
D.C. No. CR-90-0022-CBM-1

No. 90-50684
D.C. No. CR-90-0022-CBM-2

MEMORANDUM*
FILED: FEBRUARY 28, 1992
CATHY A. CATTERSON, CLERK

Appeal from the United States District Court for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Submitted February 26, 1992**

Before: CANBY, NORRIS, and LEAVY,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fe. R. App. P. 34(a); 9th Cir. R. 34-4.

Carlos and Isidro Trevino appeal the district court's order denying their joint former Fed. R. Crim. P. 35(a) motion to correct illegal sentences. The Trevinos contend that the district court erred by ordering restitution as a term of probation because (1) the restitution order compensated the victim for loss of income, in violation of the Victim and Witness Protection Act (VWPA), 18

U.S.C. Sections 3663-64, and (2) neither the information nor the plea agreement gave notice of any loss, as required for imposition of a restitution order under the former Federal Probation Act (FPA), 18 U.S.C. Section 3651 (repealed). We have jurisdiction under 28 U.S.C. Section 1291, and we affirm.

We review de novo the denial of a Rule 35(a) motion, United States v. Fowler, 794 F.2d 1446, 1449 (9th Cir. 1986), and the legality of a restitution order, United States v. McHenry, Nos. 90-10423 and 90-10424, slip op. at 17190 (9th Cir. December 27, 1991).

Under the VWPA, the district court may order a defendant to pay

restitution for "damage to or loss or destruction of property of a victim" of the offense of conviction if the offense conduct directly caused the loss. 18 U.S.C. Section 3663(b)(1); United States v. Niven, No. 90-50110, sip op. at 16892-93 (9th Cir. December 23, 1991) (citing Hughey v. United States, 110 S.Ct. 1979, 1981 (1990)); United States v. Garcia, 916 F.2d 566, 567 (9th Cir. 1990); see United States v. Koenig, Nos. 89-50523, 89-50524, 89-50530, 89-50533, and 89-50547, slip op. at 16659 (9th Cir. December 19, 1991) (district court may order restitution under VWPA for a victim bank's expenses in notifying customers of a theft, answering customer inquiries, and reprogramming stolen

accounts, but cost of reward to informant is too remote to form basis for restitution). The government bears the burden of establishing, by a preponderance of the evidence, the amount of a victim's loss. United States v. Angelica, No. 90-50696, slip op. at 15359 (9th Cir. December 6, 1991). The amount of restitution should restore the victim to his or her position before the crime. Id. at 15360 (quoting Hughey, 110 S.Ct. at 1982).

Here, the Trevinos pleaded guilty to two counts of trafficking in counterfeit goods, in violation of 18 U.S.C. Sections 2320 and 2(a) and (b). The district court imposed two concurrent terms of three years

probation. On count one, which arose out of conduct that occurred on February 12, 1985, the district court made payment of $649,401.50 in restitution to Palo Verde Nuclear Generating Station a term of probation for each defendant.

The Trevinos provided counterfeit circuit breakers to Palo Verde. When Palo Verde discovered that the breakers were counterfeit, it shut down for two days to replace them. The district court calculated a property loss to Palo Verde of $1,318,803 based on $20,850 for direct work to replace the breakers, $64,168 for engineering support, and $1,233,830 to buy replacement power for two days.

The Trevinos characterize the cost

of the replacement power as "revenue loss" and contend that the district court erred by ordering its restitution because unlike VWPA section governing restitution for bodily injury, the section governing restitution for property loss does not specifically mention loss of income. See 18 U.S.C. Section 3662(b)(1), (2). They do not challenge the other restitution costs, nor do they challenge the computation of any of the restitution amounts.

The Trevinos' contention lacks merit because the $1,233.830 was used to buy replacement power for the two days Palo Verde was shut down. The cost of replacement power is not revenue loss. The Trevinos' conduct caused the facility to shut down, which

necessitated the purchase of replacement power. Accordingly, the purchase of replacement power was not too remote to form the basis for restitution. See Koenig, slip op. at 16659. The district court therefore properly applied the VWPA by ordering restitution of $1,233,830 for the cost of replacement power. See Fowler, 794 F.2d at 1449. We need not reach the Trevinos' alternative contention that the district court did not comply with the requirements of the FPA.

We affirm the denial of the Rule 35(a) motion.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS TREVINO,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISIDRO TREVINO,

Defendant-Appellant.

No. 90-50679
D.C. No. CR-90-0022-CBM-1

No. 90-50684
D.C. No. CR-90-0022-CBM-2

ORDER
FILED: APRIL 8, 1992
CATHY A. CATTERSON, CLERK

Before: CANBY, NORRIS, and LEAVY,
Circuit Judges.

The petition for rehearing and the request for publication are denied.

APPENDIX "C"

Section 3663. Order of Restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as a element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme,

conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant-

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense-

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to

the greater of-

(i) the value of the property on the date of the damage, loss or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim-

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in

accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make

restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensatión, except that the

court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in-

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than-

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term

of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced-

(1) by the United States-

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

APPENDIX "D"

Section 3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life

imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the

conditions thereof, the defendant-

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: Provided, That the Attorney General certifies that adequate treatment facilities,

personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in it program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to

residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any punishment (other than a fine) imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of

probation. If at the end of the period of probation, the defendant has not complied with a condition of probation, the court may nevertheless terminate proceedings against the defendant, but no such termination shall affect the defendant's obligation to pay a fine imposed or made a condition of probation, and such fine shall be collected in the manner provided in section 3565 of this title.

APPENDIX "E"

MR. BECKLER: That is correct, your Honor. It's the nexus between the loss and the conduct of the Defendants subject to argument; that is the problem and not the amounts.

Mr. Eglash is correct.

THE COURT: So, am I correct that you do not disagree with the statement at paragraph 24 that the costs of $80,000 for testing the circuit breakers and for work to replace them -- you do not dispute that they incurred costs of $80,000 for testing these breakers and to replace them?

MR. BECKLER: That's correct. That is not disputed.

THE COURT: Okay. And, again, in paragraph 33, you do not dispute that

the entity incurred a loss of a million three hundred eighteen thousand eight hundred and three dollars, which includes the cost of testing, replacing switches, labor to replace equipment and lost revenue due to power outage.

MR. BECKLER: That is correct. That is not disputed as to the dollar amount.

THE COURT: Okay. Then, as to factual disputes in the report, are you prepared to have the Court make the findings of fact as they appear in this report?

Page 13

. . . sentencing memorandum, it's our position that the Court should sentence the Defendants to three years

probation and the following additional terms:

As to community service, your Honor, Probation has recommended 100 hours. The Government would recommend that the Court impose 250 hours community service.

As to fines and restitution, the presentence report recommends no fine and restitution as to each Defendant of $659,401, primarily to make up for lost revenues that are due to the shutdown at Palos Verde nuclear plant.

As to incarceration, your Honor, as the Court is aware, there is a plea agreement in this case and, in that plea agreement, the Government agreed to recommend probation.

Now, the probation report

recommends that Defendants be sentenced to one month in-home detention as a condition of probation. That raises the question, in my mind, as to whether such a sentence would be within the plea agreement since the confinement that's mentioned would be a condition of probation.

However, your Honor, because the agreement is not clear on that point, it's the Government's view that the Defendants should be sentenced to probation without any term of confinement as a condition thereof and, to the extent....

Page 17

Now, your Honor, the Government is not claiming that any catastrophe

occurred as a direct result of these products, but it is our contention that these products created a substantial and an unreasonable risk because it's simply unacceptable to have products such as circuit breakers and switches that have been tampered with or remanufactured installed in critical components of nuclear power plants, including critical safety components as is the case with the Palos Verde plant in Arizona.

In that case, your Honor, the directors of that plant had no real choice but to shut down the plant to inspect and remove from service the switches that were sold to them by Defendants.

They had to do that, your Honor,

as a direct result of these Defendants' actions. These Defendants chose to place products that were falsely labeled into the marketplace and were sent to this plant, and they really had -- so the plant director, your Honor, really had no choice but to remove them because of the risk that was posed by them.

So I don't think that it's unfair or unjust to hold these Defendants accountable for the costs incurred and the lost revenues incurred as a result of their conduct.

Your Honor, I would further note that, as a result of these Defendants' business activities, both Defendants

. . .

APPENDIX "F"

U.S. Department of Justice

United States Attorney
Central District of California

United States Courthouse
312 North Spring Street
Los Angeles, California 90012

January 26, 1990

Howard E. Beckler
6922 Hollywood Boulevard, Suite 201
Hollywood, California 90028

Re: United States v. Carlos & Isidro Trevino

Dear Mr. Beckler:

This letter is to confirm the terms of the agreement reached between this office (hereafter, "the government"), and your clients, Carlos and Isidro Trevino.

The Trevinos have agreed to plead guilty to a two-count information charging them with violating Title 18,

United States Code, Section 2320 (Trafficking in Counterfeit Goods). Each count under this statute is punishable by imprisonment for up to five years, and/or a fine of $250,000. A draft copy of the information to be filed is enclosed.

I have also enclosed a factual basis for the plea, setting forth the evidence that the government would be prepared to present at trial. Please review this carefully with the Trevinos and let me know at once if that factual basis is not completely accurate.

In exchange for the Trevino's guilty pleas as set forth above, the government agrees to not further prosecute the Trevinos for their business activities involving the sales

of circuit breakers and the use of counterfeit labels thereon, which are the subject of the current investigations being conducted by NASA and the U.S. Nuclear Regulatory Commission. The government has further agreed to recommend that the Trevinos receive a reduction under the Sentencing Guidelines for acceptance of responsibility, and to recommend that they be sentenced to probation. The government agrees to recommend a downward departure under the Sentencing Guidelines in the even that the offense level calls for a term of confinement. The government has also agreed to request that this case be assigned to the calendar of Judge Gadbois, pursuant to the low-number rule, in that this

case is related to Westinghouse Electric Corp. v. Rosen's Electrical Equipment, et al., No. CV 88-6745-RG. Finally, the government has agreed to request issuance of a summons, and will not request the issuance of arrest warrants for the Trevinos.

Defendants further agree to waive statue of limitations as to Count I.

It is understood that there is no agreement between the government and the Trevinos concerning (a) the amount of any fines and/or restitution, if any, which the government may recommend, or (b) the length or terms of any sentence of probation which is imposed.

Please review the enclosed factual basis and information carefully with

your clients. If they are acceptable, please so indicate by returning a signed copy of this letter to me at your convenience. I will then be in touch with you to arrange a summons date.

Very truly yours,

ROBERT L. BROSIO
United States Attorney

JEFFREY C. EGLASH
Assistant United States Attorney

I have read this letter, the attached factual basis, and the information. Having reviewed and discussed these documents with my attorney, I knowingly and voluntarily agree to plead guilty to this information on the terms described herein.

CARLOS TREVINO Date: 2-12-90

ISIDRO TREVINO Date: 2-12-90

I have read this letter, the attached factual basis, and the information. I have discussed these items with Carlos and Isidro Trevino, and I concur in the agreement set forth herein.

HOWARD E. BECKLER Date: 2-12-90

Attorney for Carlos

and Isidro Trevino

cc: William J. McNutly

Richard Carpenter

APPENDIX "G"

There is no mandatory minimum sentence. There is no mandatory supervised release under this statute.

Your Honor, if the case were to proceed to trial, the Government would present the following evidence. First, by way of background, your Honor, at all times relevant to the charges in this case, Carlos and Isidro Trevino jointly owned and operated California Breakers, Incorporated, and ATS Circuit Breakers, both of which do business within the Central District of California.

These businesses were engaged in the business of buying and selling various electrical components, including electrical circuit breakers. The regularly -- the businesses, that

is, regularly purchased previously used circuit breakers, re-conditioned those circuit breakers and re-sold them.

It was further the practice of these businesses, your Honor, to, in certain cases, apply counterfeit labels to reconditioned circuit breakers, which labels contained distinctive designs or logos similar or identical used to those used by the manufacturer of the circuit breakers, including companies such as Westinghouse, General Electric, and Square "D."

Neither the Trevinos nor their businesses were expressly authorized to produce and/or use these labels on any reconditioned or re-manufactured circuit breakers. The Trevinos were aware that they were not so authorized

to use these labels. They were aware that these were not genuine or authentic labels. They were aware that they were used by their companies on re-conditioned circuit breakers, and the Trevinos consented and authorized the use of these labels in such a manner.

Your Honor, the Trevinos were further aware that it was the regular policy and practice of their companies to, in certain cases, use false and counterfeit UL labels, referring to Underwriter's Laboratories, your Honor, on their reconditioned or re-manufactured circuit breakers.

Evidence developed, your Honor, would establish that the Trevinos would obtain these labels in at least two

different ways. One by purchasing them from an individual named Rockney Rhodes in Colorado, and secondly, your Honor, by taking genuine labels from Square "D" or Westinghouse, General Electric, to a printing shop, and having duplicate labels printed up and prepared for use.

Your Honor, as alleged in Count 1 of the information, on or about February 12th, 1985, Carlos and Isidro Trevino sold or caused California Breakers to sell ten General Electric Company circuit breakers to the Arizona Public Service Company in care of Bectel Construction, Palo Verde Nuclear Generating Station. These circuit breakers, your Honor, contained labels purporting to be General Electric

Company and U.L. labels, when in fact, as the Trevinos both then well knew, the labels were counterfeits.

Your Honor, as alleged in Count II of the information, on or about February 16 of 1988, Carlos and Isidro Trevino sold and cause ATS Circuit Breakers to sell 30 reconditioned Square "D" circuit breakers to the Electric Supply Company of San Luis Obispo, California. These circuit breakers, as well, your Honor, contained labels purporting to be genuine Square "D" labels. However, in fact, as the Trevinos both then well knew, the labels were counterfeit.

Your Honor, that is, in substance, the evidence that the Government would present at trial in this matter.

THE COURT: Would the Government's counsel state again the two dates that are alleged in the Counts I and II?

MR. EGLASH: Thank you, your Honor. February 12th, 1985 as to Count I. And March 18th, 1988 as to Count II.

THE COURT: Mr. Beckler, do you wish to add anything further to the factual basis or to the maximum sentence that could be imposed?

MR. BECKLER: No, your Honor.

THE COURT: Then I would just inquire of the defendants. You've each heard Government's counsel state what he believes the evidence would show if the case were going to trial, is that correct?

MR. CARLOS TREVINO: Yes.

MR. ISIDRO TREVINO: Yes.

THE COURT: And based upon his statements as to what the evidence would show, do you still wish to have the Court accept your guilty plea in this case?

MR. ISIDRO TREVINO: Yes, I do.

MR. CARLOS TREVINO: Yes.

THE COURT: I'm going to ask that each of you state for me and for the record what you did in this case that you believe constitutes the law violation to which you are pleading guilty. In other words, in your own words, state to the Court what you did, so that I can determine whether there is a factual basis for it.

MR. CARLOS TREVINO: All right.

MR. BECKLER: Can we go with the

senior brother first, your Honor?

THE COURT: Yes, you can.

MR. BECKLER: All right.

MR. CARLOS TREVINO: Waht we did is we --

THE COURT: You tell me what you did.

MR. ISIDRO TREVINO: Pardon me?

THE COURT: Tell me what you did.

MR. CARLOS TREVINO: What I did?

THE COURT: What you did, yes.

MR. CARLOS TREVINO: Okay. The company, as I represent the company, we photocopied labels as mentioned -- General Electric, Westinghouse, Square "D" -- and apply them to circuit breakers for the sale of those breakers.

THE COURT: You were not authorized

by these companies to apply their labels to these circuit breakers that you were selling?

MR. CARLOS TREVINO: We were not, no.

THE COURT: And you knew that you weren't authorized to do so?

MR. CARLOS TREVINO: Correct.

THE COURT: So you knew at the time that you were applying counterfeit labels to this merchandise?

MR. CARLOS TREVINO: Not original labels, yes.

MR. BECKLER: Your Honor, that -- probably semantically, it was a label that originally appeared on the circuit breaker that either was worn off, cut off, destroyed. And as Mr. Carlos Trevino indicated, as Mr. Eglash did, they would go out unauthorized and have those re-printed and put on, so it looked like a new fresh label. If the correct language is counterfeit, so be

it, but it was a re-manufactured label without permission.

THE COURT: The circuit breakers that were being sold were used circuit breakers?

MR. CARLOS TREVINO: Reconditioned circuit breakers.

THE COURT: So basically what happened was that initially the circuit breakers bore the label of a company, and that was proper. I mean it was a company that had made them or produced them. What you did is you took the circuit breakers and had them reconditioned, and then copied, photocopied the labels of these companies, and then put the labels back on, so that it would appear to the purchaser that they were buying a

circuit breaker from a particular company, is that correct?

MR. CARLOS TREVINO: Yes.

THE COURT: Okay. Could we hear form the junior brother? Sir, would you tell me what it is that you did in this case that caused you to feel that you committed a law violation?

MR. ISIDRO TREVINO: Okay, well we made reproductions without having any authority from the manufacturers. We reproduced labels, and we attached the labels to circuit breakers. And some of those circuit breakers that had those labels were sold to this agency of the Government.

THE COURT: And again, I think you said, you were not authorized to use the labels of these other companies?

MR. ISIDRO TREVINO: Right, we were not authorized to use those labels.

THE COURT: And you knew that you had not been authorized to use them?

MR. ISIDRO TREVINO: Yes, I did -- I did not.

THE COURT: And you knew that by affixing them to the circuit breakers, that that would represent to a purchaser that these circuit breakers actually came from these companies whose labels appeared thereon?

MR. ISIDRO TREVINO: Yes.

THE COURT: Is the Government satisfied that there is a factual basis based upon the statements that each of the defendants have made as to their involvement?

MR. EGLASH: Yes, your Honor.

THE COURT: The Government's counsel has indicated that that the maximum sentence that could be imposed pursuant to the statute that governs this particular violation is 5 years, a fine of $250,000 or both. Since you are each pleading guilty to two counts in the information, if the Court ordered that the sentence be served consecutively, one after the other, then the maximum sentence would be ten years, a fine of $500,000 or both as to the two counts together. Do you understand this to be the maximum sentence that could be imposed in this case?

MR. CARLOS TREVINO: I understand.

MR. ISIDRO TREVINO: Yes, I do.

THE COURT: And understanding this, you still wish to have the Court accept your guilty plea?

MR. ISIDRO TREVINO: Yes, I do.

MR. CARLOS TREVINO: Yes, I do.

THE COURT: Now, what's important about the sentence....

APPENDIX "H"

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLOS TREVINO and
ISIDRO TREVINO,

Defendants.

CR 9022
INFORMATION
[18 U.S.C. SEC. 2320: Trafficking in Counterfeit Goods; 18 U.S.C. Sec. 2(a) and (b); Aiding and Abetting; Causing an Act to be Done]

FILED: January 31, 1990
CLERK, U S DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

The United States Attorney charges:

COUNT ONE

[18 U.S.C. Section 2320; 18 U.S.C. Section 2]

On or about February 12, 1985, in Los Angeles County, within the Central District of California, defendants CARLOS TREVINO and ISIDRO TREVINO intentionally trafficked in, and counseled, commanded, induced, procured, and caused California Breakers, Incorporated, to traffic in goods knowingly using a counterfeit mark on and in connection with such goods, to wit: 10 General Electric Company circuit breakers, model number TJK426Y400, bearing counterfeit General Electric D Company labels.

COUNT TWO

[18 U.S.C. Section 2320; 18 U.S.C.

Section 2]

On or about March 18, 1988, in Los Angeles County, within the Central District of California, defendants CARLOS TREVINO and ISIDRO TREVINO intentionally trafficked in, and counseled, commanded, induced, procured, and caused ATS Circuit Breakers, Incorporated, to traffic in goods knowingly using a counterfeit mark on and in connection with such goods, to wit: 30 Square D Company circuit breakers, model number KHL36125, bearing counterfeit Square D Company labels.

ROBERT L. BROSIO
United States Attorney

(2)

No. 92-10

Supreme Court, U.S.
FILED
AUG 28 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CARLOS TREVINO AND
ISIDRO TREVINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners, who sold counterfeit circuit breakers to a nuclear power plant, could be required under the Victim and Witness Protection Act to pay restitution that included the power plant's cost of procuring an alternative supply of power for its customers during the period the plant was shut down to replace the counterfeit circuit breakers.

2. Whether the restitution order was improper because neither the criminal information nor the plea agreement informed petitioners of the amount of restitution that might be ordered under the Victim and Witness Protection Act.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the judgment is noted at 956 F.2d 276 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1992. A petition for rehearing was denied on April 8, 1992. Pet. App. B1. The petition for a writ of certiorari was filed on June 29, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering guilty pleas in the United States District Court for the Central District of California, petitioners were convicted of two counts of trafficking in goods bearing counterfeit labels, in violation of 18 U.S.C. 2320. Petitioners were each fined $5,000 and placed on probation for concurrent terms of three years on each count. As a condition of probation, each petitioner was ordered to pay restitution in the amount of $659,401.50. Gov't C.A. Br. 3. The court of appeals affirmed.

1. Petitioners owned and operated two related businesses, California Breakers, Inc., and Anti-Theft Systems, Inc. Both companies were in the business of purchasing circuit breakers for resale. In some instances, the companies altered previously used circuit breakers by recalibrating the breakers or changing their amperage ratings. Petitioners then unlawfully placed counterfeit manufacturers' labels and Underwriters' Laboratory labels on the breakers to give them the appearance of being new and of being approved at the designated amperage ratings. Gov't C.A. Br. 4-5. One set of breakers unlawfully bearing counterfeit labels was sold by petitioners' company, Anti-Theft Systems, Inc., to Pacific Gas and Electric Company for use at the Diablo Canyon Nuclear Power Plant. Those breakers were not used in the plant, because they were determined not to be of the proper type. Gov't C.A. Br. 6. An investigation of those breakers led to the discovery that petitioners' other company, California Breakers, Inc., had sold counterfeit circuit breakers in 1985 for use

in the Palo Verde Nuclear Generating Facility in Phoenix, Arizona. *Id.* at 7.

The breakers sold by petitioners were installed in a key safety system at the Palo Verde Nuclear Generating Facility. They were examined and were found to have been subjected to unauthorized tampering and modification. The Palo Verde management decided to shut down the facility for two days to replace the potentially defective breakers. As a result of the shutdown, the Palo Verde Nuclear Generating Facility incurred a loss of $1,318,803. That loss included $20,805 to replace the breakers and switches involved, $64,168 for engineering, quality assurance, and other support directly related to the replacement of the breakers, and $1,233,830 to purchase, for supply to its customers, electric power that otherwise would have been generated by the plant during the two days that the plant was out of operation. Gov't C.A. Br. 7-8.

2. In January 1990, petitioners agreed to plead guilty to a two-count information charging them with trafficking in counterfeit goods, in violation of 18 U.S.C. 2320, based on their sales of counterfeit-labeled circuit breakers to the Diablo Canyon and Palo Verde facilities. In exchange for petitioners' guilty pleas, the government agreed not to prosecute them further for their business activities involving the sale of falsely labeled circuit breakers and to recommend a sentence of probation. C.A. Excerpts of Record 6. The plea agreement specified that "[i]t is understood that there is no agreement between the government and [petitioners] concerning (a) the amount of any fines and/or restitution, if any, which the government may recommend." *Id.* at 7. Neither the information nor the plea agreement advised peti-

tioners of the amount of restitution that might be ordered in the case.

The presentence report recommended that restitution in the amount of $1,318,803 be awarded to compensate for the loss incurred by the Palo Verde facility as a direct result of petitioners' offense. Petitioners objected to any restitution order, arguing that they were not directly responsible for the losses suffered by the Palo Verde facility. After a hearing, the court accepted the calculation in the presentence report and ordered each petitioner to pay restitution in the amount of $659,401.50, as a condition of probation. Pet. App. A6; Gov't C.A. Br. 9.

3. Petitioners thereafter filed a motion in district court to correct their sentences under Fed. R. Crim. P. 35(a). They argued that the $1,233,380 cost to the Palo Verde facility of purchasing replacement power during the two-day plant shutdown was not the type of loss for which restitution was authorized under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663. The district court rejected petitioners' claim, finding that "[t]he replacement power losses in the instant case are directly * * * caused by the offenses to which [petitioners] pleaded guilty." C.A. Excerpts of Record 13.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A8. The court noted that petitioners did not challenge the computation of any of the restitution amounts. Rather, they objected only to paying restitution for the cost of the replacement power that the Palo Verde facility purchased during the shutdown. That sum, they claimed, was tantamount to "revenue loss" for which the statute did not authorize restitution. *Id.* at A7. The court rejected petitioners' argument, ruling that "[t]he

cost of replacement power is not revenue loss. [Petitioners'] conduct caused the facility to shut down, which necessitated the purchase of replacement power. Accordingly, the purchase of replacement power was not too remote to form the basis for restitution." [1] *Id.* at A7-A8.

ARGUMENT

1. Petitioners argue (Pet. 10-11) that the cost of purchasing replacement power for the power plant's customers during the two-day shutdown is a type of property loss for which the VWPA does not authorize restitution. A straightforward reading of the statute reveals this contention to be incorrect. The cost of purchasing replacement power in this case is properly characterized as a "loss * * * of property" (18 U.S.C. 3663(b)(1)) incurred as a direct result of petitioners' offense. As such, it was correctly included in the restitution order.

As this Court recognized in *Hughey* v. *United States*, 495 U.S. 411, 416 (1990), the VWPA seeks to restore the victim to its position before the crime. The VWPA, 18 U.S.C. 3663(b), provides that, "in the case of an offense resulting in * * * loss * * * of property of a victim of the offense," the court may order a defendant to pay restitution in the amount of the "value of the property on the date of the * * * loss."

---

[1] In light of its ruling that the VWPA authorized the restitution order, the court did not reach petitioners' arguments concerning the scope of restitution permitted under the Federal Probation Act. See Pet. C.A. Br. 10-12; Pet. App. A8; see also Pet. 18-21.

In this case, the Palo Verde plant was forced to shut down for two days to remove the counterfeit and potentially defective circuit breakers supplied by petitioners. The need to shut down was the direct result of petitioners' offense, which led to the installation of the defective circuit breakers. One of the expenses incurred in the shutdown was the cost of power to supply the plant's customers—power that ordinarily would have been generated by the plant, but which had to be procured elsewhere because of the shutdown. The cost of the replacement power is not materially different from the other out-of-pocket expenses incurred by the Palo Verde facility as a direct result of petitioners' offense. Thus, the restitution ordered for that amount accords with both the letter and the purpose of the VWPA.[2]

Petitioners characterize the amounts expended to purchase replacement power as a form of "lost revenue" or "lost income" that cannot be recovered as restitution under the VWPA. In support of their argument, they note that the statutory provision dealing with restitution for "bodily injury" explicitly authorizes reimbursement to the victim "for income lost" as a result of the offense, 18 U.S.C. 3663(b)(2),

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[2] The Ninth Circuit has held that restitution for economic loss under the VWPA is limited to losses "directly caused" by the offense of conviction. See, *e.g.*, *United States* v. *Koenig*, 952 F.2d 267, 275 (1991); *United States* v. *Kenney*, 789 F.2d 783, 784, cert. denied, 479 U.S. 990 (1986). Petitioners have not challenged the district court's and court of appeals' determination that the shutdown of the Palo Verde facility and the replacement of the counterfeit circuit breakers was "directly caused" by the offense of conviction; nor have petitioners challenged the calculation of the amounts expended by the facility as a direct consequence of the plant shutdown.

but that the provision governing restitution for property loss does not specifically mention recovery of lost income. By implication, they maintain, that type of economic loss cannot be recovered under the Act.

Petitioners' argument fails. Even assuming that the statute does not permit restitution for lost income on property,[3] the cost of replacement power in this case cannot properly be characterized as "lost revenue" or "lost income." As petitioners acknowledge (Pet. 17), the Palo Verde facility did not lose income: its customers paid for the electricity they received during the two-day shutdown. As a result of the shutdown, however, the facility incurred additional out-of-pocket costs: it was required to purchase substitute electrical power for its customers, since it could not generate its own. That added expense constituted a direct economic loss to the power plant, and was properly included in an order of restitution.[4]

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[3] As petitioners note, the Section of the Act dealing with bodily injury enumerates the specific types of expenses that can be included in an order of restitution, including the costs of medical and personal care, see Section 3663(b)(2)(A) and (B), and lost income, see Section 3663(b)(2)(C). The property loss provision, however, does not itemize the types of property losses that are recoverable; rather, it refers generally to "damage to or loss or destruction of property of a victim of the offense." Section 3663(b)(1). Since, in this case, the Palo Verde facility presumably continued to receive revenue during the shutdown period as payment for the power it purchased and supplied to its customers, this case does not present the question whether loss of revenue or income on property can fairly be regarded as a form of "property loss" for which restitution is available under the VWPA.

[4] To the extent that the Palo Verde facility's cost of generating electric power would have been less than the cost

2. Petitioners also argue (Pet. 18-23) that the restitution award was improper because it involved a substantial amount of money that was not identified in either the plea agreement or the criminal information. That point was not passed on by the court of appeals, because petitioners advanced that argument only with respect to the validity of the restitution award under the Federal Probation Act, and the court of appeals upheld the award under the VWPA. In any event, the argument has no merit.

There is no provision in the VWPA requiring that the amount of restitution be stated in the formal charging documents. Section 3664, which specifies the procedure for issuing an order of restitution, explicitly provides that the court shall resolve any dispute as to "the proper amount or type of restitution" by the preponderance of the evidence, and that the government has the burden "of demonstrating the amount of the loss sustained by a victim as a result of the offense." Section 3664(d). That Section contains no requirement that the amount of loss be stated in the charging instrument or in the plea agreement.

To the contrary, Section 3664 contemplates that the loss to the victim will be investigated and calculated by the probation officer, and included in the presentence report. See Section 3664(b). The Act requires that the court disclose the relevant portions of the presentence report to the defendant and the government prior to the sentencing proceeding. Section 3664(c). Those procedures would not be included in

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of purchasing replacement power from other generators (as it presumably was), the facility also lost profit during the two-day shutdown. But the restitution order did not require petitioners to pay for any lost profit.

the Act if the amount of loss to the victim were required to appear in the charging instrument or the plea agreement before it could form the basis of a restitution order.

Petitioners do not cite any court decision holding that the VWPA requires that the charging instrument or the plea agreement recite the amount of loss that will be the basis of the restitution order, and we have found none. *United States* v. *Whitney*, 785 F.2d 824, amended and reh'g en banc denied, 838 F.2d 404 (9th Cir. 1988), and the cases cited therein on which petitioners rely (Pet. 18-19), dealt with restitution under the Federal Probation Act, 18 U.S.C. 3651, which did not include any procedure for determining the restitution amount. To assure "certainty" and "fairness," 785 F.2d at 825, in the calculation of restitution awards under the Federal Probation Act, the courts imposed a requirement that the amount of restitution be alleged in the charging instrument or set forth in the plea agreement. But the VWPA differs from the Federal Probation Act by including specific procedures for determining the amount of the restitution. See 18 U.S.C. 3664; *Whitney*, 838 F.2d at 404 n.1. There is thus no basis for importing into the VWPA the requirement engrafted onto the Federal Probation Act that the indictment allege or the plea agreement stipulate the amount of the loss caused by the offense of conviction.

Other cases cited by petitioners (Pet. 22-23) all deal with circumstances in which the failure to state the amount of restitution materially altered the basis of the plea agreement, so that ordering restitution in the amount involved constituted a breach of the plea agreement. See *United States* v. *Kramer*, 781 F.2d 1380, 1388-1389 (9th Cir.), cert. denied, 479 U.S.

819 (1986); *United States* v. *Burruezo*, 704 F.2d 33, 38 (2d Cir. 1983); *United States* v. *Garcia*, 698 F.2d 31, 35-37 (1st Cir. 1983); *United States* v. *Runck*, 601 F.2d 968, 969-970 (8th Cir. 1979), cert denied, 444 U.S. 1015 (1980). Petitioners' plea agreement specifically stated that the agreement did not address the amount of restitution that might be ordered. Thus, the restitution order in this case did not violate the agreement, and petitioners cannot claim that the agreement misled them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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